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Cour internationale
de Justice
LA HAYE

International Court
of Justice
THE HAGUE

YEAR 1990

Public sitting of the Chamber

held on Friday 5 June 1990, at 11 a.m., at the Peace Palace,

Judge Sette-Camara, President of the Chamber, presiding

in the case concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)

Application by Nicaragua for permission to intervene

VERBATIM RECORD

ANNEE l990

Audience publique de la Chambre

tenue le vendredi 5 juin 1990, à 11 heures, au palais de la Paix,

sous la présidence de M. Sette-Camara, président de la Chambre

en l'affaire du Différend frontalier terrestre, insulaire et maritime (El Salvador/Honduras)

Requête du Nicaragua à fin d'intervention

COMPTE RENDU

Present:

Judge Sette-Camara, President of the Chamber
Judges Oda
Sir Robert Jennings
Judges *ad hoc* Valticos
Torres Bernárdez

Registrar Valencia-Ospina

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Présents :

M. Sette-Camara, président de la Chambre
M. Oda
Sir Robert Jennings, juges
M. Valticos
M. Torres Bernárdez, juges *ad hoc*

M. Valencia-Ospina, Greffier

_____

The Government of Nicaragua is represented by:

H.E. Mr. Carlos Argüello Gómez — Ambassador,

as Agent and Counsel;

Assisted by:

Mr. Ian Brownlie, Q.C., F.B.A — Chichele Professor of Public International Law, University of Oxford; Fellow of All Souls College, Oxford,

Mr. Antonio Remiro Brotons — Professor of Public International Law, Universidad Autónoma de Madrid,

as Counsel and Advocates.

The Government of El Salvador is represented by:

Dr. Alfredo Martínez Moreno — *as Agent and Counsel*;

H.E. Mr. Roberto Arturo Castrillo Hidalgo — Ambassador,

as Co-Agent;

and

H.E. Dr. José Manuel Pacas Castro — Minister for Foreign Relations;

assisted by

Mr. Keith Highet — Adjunct Professor of International Law at the Fletcher School of Law and Diplomacy and Member of the Bars of New York and the District of Columbia,

Mr. Elihu Lauterpacht C.B.E., Q.C. — Director of the Research Centre for International Law, University of Cambridge, Fellow of Trinity College, Cambridge,

Mr. Prosper Weil — Professor Emeritus at Université de droit, d'économie et de sciences sociales de Paris,

as Counsel and Advocates;

and

Le Gouvernement du Nicaragua est représenté par :

S.Exc. M. Carlos Argüello Gómez — ambassadeur,

comme agent et conseil;

assisté de

M. Ian Brownlie, Q.C., F.B.A. — professeur de droit international public à l'Université d'Oxford, titulaire de la chaire Chichele, Fellow de l'All Souls College, Oxford,

M. Antonio Remiro Brotons — professeur de droit international public à l'Universidad Autónoma de Madrid,

comme conseils et avocats.

Le Gouvernement d'El Salvador est représenté par :

M. Alfredo Martínez Moreno — *comme agent et conseil*;

S.Exc. M. Roberto Arturo Castrillo Hidalgo — ambassadeur aux Pays-Bas

comme coagent;

et

S.Exc. M. José Manuel Pacas Castro — ministre des relations extérieures;

assistés de

M. Keith Highet — professeur adjoint de droit international à la Fletcher School of Law and Diplomacy et membre des barreaux de New York et du district de Columbia,

M. Elihu Lauterpacht C.B.E., Q.C. — directeur du Research Center for International Law de l'Université de Cambridge; Fellow du Trinity College de Cambridge,

M. Prosper Weil — professeur émerite à l'Université de droit, d'économie et de sciences sociales de Paris,

comme conseils et avocats;

et de

Mr. Anthony J. Oakley

Lic. Celina Quinteros

Lic. Ana Elizabeth Villalta Vizcara — *as Counsellors*.

The Government of Honduras is represented by:

H.E. Dr. Ramón Valladares Soto — Ambassador-designate to the Netherlands,

as Agent;

assisted by

Mr. Derek W. Bowett, C.B.E., Q.C., Ll.D., F.B.A. — Whewell Professor of International Law, University of Cambrid

as Counsel and Advocate;

and

Mr. Arias de Saavedra y Muguelar — Minister, Chargé d'affaires a.i., Embassy of Honduras at the Hague,

Mrs. Salomé Castellanos — Minister Counsellor, Embassy of Honduras at the Hague,

as Advisers.

M. Anthony J. Oakley

Mme Celina Quinteros

Mme Ana Elizabeth Villalta

comme conseillers.

Le Gouvernement du Honduras est représenté par :

S.Exc. M. Ramón Valladares Soto — ambassadeur (désigné) aux Pays-Bas,

comme agent;

assisté de

M. Derek W. Bowett, C.B.E., Q.C., Ll.D., F.B.A. — professeur de droit international à l'Université de Cambridge, titulaire de la chaire Whewell

comme conseil et avocat;

et de

M. Arias de Saavedra y Muguelar — ministre, chargé d'affaires a.i. de l'ambassade du Honduras aux Pays-bas,

Mme Salomé Castellanos — ministre-conseiller à l'ambassade du Honduras aux Pays-Bas,

comme conseillers.

The PRESIDENT OF THE CHAMBER: The sitting is open.

The Chamber formed to deal with the case concerning the *Land, Island and Maritime Frontier Dispute* between El Salvador and Honduras is holding the present series of public hearings, pursuant to Article 84, paragraph 2, of the Rules of Court, in order to hear observations and argument on the question whether the Application by the Government of Nicaragua to intervene in the present proceedings under Article 62 of the Statute should be granted. However, before placing on record the procedural background to the present hearing, I have first to refer to a sad event which has affected the composition of the Chamber.

The present Chamber was established, at the request of the Parties, and after they had been consulted as to its composition, by an Order made by the Court on 8 May 1987. In addition to Judges Oda and Sir Robert Jennings and myself, the Chamber included the Judges *ad hoc* chosen by the Parties, namely Mr. Nicolas Valticos chosen by El Salvador and Mr. Michel Virally chosen by Honduras. The Chamber as so constituted held an inaugural public sitting on 9 November 1987 at which, *inter alia*, the two Judges *ad hoc* made the solemn declaration required by Articles 20 and 31 of the Statute and Article 8, paragraph 2, of the Rules of Court.

In January 1989 the Court and the Chamber learned with deep regret that Judge *ad hoc* Virally had died on 27 January 1989; the President of the Court, Judge Ruda, paid tribute to his memory at a public sitting of another Chamber of the Court, that formed to deal with the case concerning *Elettronica Sicula S.p.A. (ELSI)*, on 13 February 1989, and at that meeting a minute of silence was observed in tribute to the memory of Judge Virally. It would however not be fitting for this Chamber, of which Judge Virally was a Member, to let the present occasion pass without publicly subscribing to the tribute then paid. As President Ruda then observed, Judge Virally was one of the most distinguished of his generation of French jurists, with wide experience also in international organizations and conferences, and his friends and colleagues will greatly regret that he was not to be given the opportunity of demonstrating his great legal gifts in the capacity of an international judge in this Chamber.

By a letter dated 9 February 1989, the Agent of Honduras informed the Court that his

Government had chosen Mr. Santiago Torres Bernárdez to sit as Judge *ad hoc* in the place of Judge Virally. By an Order dated 13 December 1989 the Court took note of the death of Judge Virally and the nomination of Mr. Torres Bernárdez, and of a number of communications from the Parties, noted that it appeared that El Salvador had no objection to the choice of Mr. Torres Bernárdez, and that no objection to that choice appeared to the Court itself, and declared that the Chamber formed to deal with the case was composed of Judges Oda and Jennings and myself, Judge *ad hoc* Valticos and Judge *ad hoc* Torres Bernárdez. The first business of today's meeting will therefore be for Judge Torres Bernárdez to make the solemn declaration required by the Statute and Rules of Court.

Judge Torres Bernárdez is of course very far from being a stranger to this courtroom, or indeed to the bench; for a number of years his place was at this table when he served the Court as its Registrar. Prior to his election to that post, he had a long and distinguished career in the Office of Legal Affairs in the United Nations, where he was recognized as a learned and outstanding international lawyer by his activities and his writings and which he concluded as Deputy-Director of the Codification Division. Of Spanish nationality, he comes to the present case with the extra advantage of a culture and language shared with the Central American States concerned. My colleagues of the Chamber and myself are most pleased that he has been chosen to sit amongst us as Judge *ad hoc* and extend a warm welcome to him.

I invite those present to stand while Judge *ad hoc* Torres Bernárdez makes the solemn declaration required by the Statute and Rules of Court.

Judge TORRES BERNARDEZ: I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously.

The PRESIDENT OF THE CHAMBER: I place on record the solemn declaration just made by Judge Torres Bernárdez, and declare him duly installed as a Member of the Chamber formed to deal with the case concerning the *Land, Island and Maritime Frontier Dispute*, in the capacity of

Judge *ad hoc*.

The written proceedings in the case had reached an advanced stage when, on 17 November 1989, the Republic of Nicaragua filed in the Registry of the Court an Application for permission to intervene in the case, which Application was stated to be made by virtue of Article 36, paragraph 1, and Article 62, of the Statute of the Court. The latter Article provides that:

> "Should a State consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene.
>
> It shall be for the Court to decide upon this request."

In its Application, Nicaragua gave an indication of, *inter alia*, the legal interest which it considered that it has and which may be affected by the decision of the Chamber in the present case. It however also contended that its request for permission to intervene was a matter exclusively within the procedural mandate of the full Court. By an Order dated 28 February 1990, the Court, after considering the written observations of the Parties on the question thus raised, i.e., whether the Application for permission to intervene is to be decided by the full Court or by the Chamber, and the observations of Nicaragua in response to those observations, found that it was for the Chamber to decide whether the Application for permission to intervene under Article 62 of the Statute should be granted.

Pursuant to Article 83, paragraph 1, of the Rules of Court, the two Parties to the case, El Salvador and Honduras, were invited to furnish their observations on the Application for permission to intervene, and both Parties submitted such observations within the time-limit fixed therefor.

Honduras in its observations indicated that it would see no objection to Nicaragua being permitted to intervene to a limited extent, on the lines indicated by Honduras in its observations. El Salvador in its observations on the other hand requested the Chamber to deny the permission to intervene sought by Nicaragua. Article 84, paragraph 2, of the Rules of Court provides that if an objection is filed to an Application for permission to intervene, the Court is to hear the State seeking to intervene and the Parties before deciding. The present public hearings are being held for that purpose.

After ascertaining the views of the Parties in accordance with Article 53, paragraph 2, of the Rules of Court, the Chamber has decided that the observations of the two Parties on the Application for permission to intervene will be made accessible to the public with effect from the opening of the present proceedings.

I note the presence in Court of the Agents, counsel and other representatives of the two Parties - which include the Minister for Foreign Affairs of El Salvador - and the Agent, counsel and representatives of Nicaragua, the State seeking to intervene. The representatives of Nicaragua will address the Chamber first, and I therefore give the floor to the Agent of Nicaragua, Mr. Carlos Argüello Gómez.

Mr. ARGUELLO GOMEZ: Thank you Mr. President, Members of the Chamber. Before going further I wish to acknowledge the honour of addressing, on behalf of my country, such a gathering of eminent persons in the field of international law.

Within the limits indicated in this speech, Nicaragua reaffirms its Application for permission to intervene made to the full Court on 17 November 1989 in the case concerning *Land, Island and Maritime Frontier Dispute* brought by Honduras and El Salvador. This Application has been made pursuant to Article 62 of the Statute and seeks to ensure the protection or safeguarding of Nicaragua's interests of a legal nature by preventing them from being affected by the decision to be rendered on the merits of the case in the absence of Nicaragua. In making this Application for permission to intervene, Nicaragua assumes the obligations of a party to the case within the meaning of Article 59 of the Statute.

As you are aware, Nicaragua addressed a letter to the Court on 20 April 1988 conveying the view of the Government to the effect that Nicaragua had an interest of a legal nature which could be affected by a decision of this Chamber. In that same letter, Nicaragua in reliance on the principle of consent, reserved its position generally in relation to the Court's Order of 8 May 1987, that is, the Order that created this Chamber.

Consistent with the position it had reserved, Nicaragua filed its Application for permission to intervene on 17 November 1989, not before this Chamber but before the full Court. In its Order of

28 February 1990 the Court found that it was for this Chamber to decide whether Nicaragua's Application for permission to intervene under Article 62 of the Statute should be granted.

This Order has added to the dilemma Nicaragua has faced since the formation of this Chamber. First of all, and without the need of quoting intimations made by those privy to the formation of this Chamber or the other Chambers formed in the recent past, it is known that, in practice, the procedure followed in the formation and selection of the members of a Chamber is subject to consultations with the original parties. This is the root of the problem. Judge Shahabuddeen, in his dissenting opinion to the Order of the Court, made a thorough and necessary comment on all the problems entailed by the formation of Chambers.

At this point let me make one thing very clear. The position of Nicaragua is and has been one of principle. It has nothing to do with the integrity of the distinguished Members of this Chamber. If Nicaragua had participated in the creation of this Chamber, I am quite sure that the composition would not necessarily have been greatly different and, certainly, Nicaragua would not have objected to any of its members including the distinguished Judges *ad hoc* that have been selected by the Parties.

Again, Nicaragua had no wish to appear before a body in whose creation it had not participated. Any other position would be tantamount to accepting an unequal role for Nicaragua vis-à-vis the original Parties.

This was our original dilemma. Now it has been compounded by the fact that the Order of the Court has been interpreted as automatically transferring or remanding to this Chamber the Application made by Nicaragua to the full Court. But, with due respect, in Nicaragua's view, the Order in question simply indicates that the full Court is not competent to deal with Nicaragua's Application. It does not mean that the request made by Nicaragua and addressed very carefully to the full Court, can be - without Nicaragua's consent - dealt with by this Chamber.

To be quite frank on this point, we were surprised to be put in such an unfair position with respect to El Salvador and Honduras, and we have been very hesitant in our decision to present ourselves at these hearings in case it be understood that we had, willingly and without adequate

protest and reservation of our position, agreed to come before the Chamber.

We have come before you, with all due respect and appreciation, but also - let it be put in the record - under protest with regard to the procedure that has been followed.

One of our major problems in deciding whether to present ourselves for this hearing of our request for intervention addressed to the full Court was that we could not accept that any decision given by the Chamber as presently constituted could be binding on Nicaragua. Now, if this were the only way that a decision could affect Nicaragua, we would have been perfectly willing not to expend our resources on these proceedings and simply sat back and relaxed under the apparently soothing effects of Article 59 of the Statute.

But the fact that some action is binding or not on a State does not mean that its interests cannot be profoundly affected. For example, the Special Agreement between El Salvador and Honduras is not binding on Nicaragua but, nonetheless, it affects its interests of a legal nature.

And so with any decision given by the Chamber. Even if it were not binding on Nicaragua in its absence, it would still affect its interests of a legal nature in the sense contemplated by Article 62. This is surely one of the reasons why Article 62 coexists with Article 59 of the Statute. In a sense, Article 62 covers the gaps not filled by Article 59. As Judge Sir Robert Jennings stated in his dissenting opinion in the Italian intervention case:

> "it would be unrealistic even in consideration of strict legal principle, to suppose that the effects of a judgment are thus wholly confined by Article 59" (*I.C.J. Reports 1984*, p. 158).

So the legal dilemma that has been created by this peculiar development of the institution of intervention is that if the only way to intervene in a case is if one accepts the decision given by the Court or the Chamber *as binding*, then, particularly in the present instance where Nicaragua has been forced to come to an *ad hoc* chamber of the original parties, the risk is to jump from the frying pan of having our legal interests stepped on, to the fire of accepting an *ad hoc* chamber of the original parties.

The final decision of Nicaragua, as I made clear on my first statement, was to appear before the Chamber whilst maintaining its Application for permission to intervene filed before the full Court but, within the limits set precisely by the full Court. These limits were defined in its Order of

28 February 1990,

> "Whereas, in the first place, while Nicaragua has thus referred to certain questions concerning the composition of the Chamber, it has done so only in contemplation of a favourable response being given to its request for intervention; whereas, in the second place, while Nicaragua contemplates a limitation of the mandate of the Chamber, its request to that effect is put forward only 'in the alternative'; whereas the Court is thus not called upon to pronounce on any of these questions;
>
> Whereas the mention in the Application of these questions, which are thus contingent on the decision whether the application for permission to intervene is to be granted, cannot lead the Court to decide in place of the Chamber the anterior question whether that application should be granted." (*I.C.J. Reports 1990*, pp. 5-6.)

The interpretation thus made by the Court in its Order is that the issue of whether the Application to intervene should be granted is anterior to the decision on whether it is proper for the Court to have formed the Chamber or on whether the composition of the Chamber should be altered. Therefore, now that Nicaragua is before the Chamber reiterating its petition to intervene, it does so without submitting to the Chamber on this opportunity the two questions that the full Court stated could only be resolved after the decision on the Application for permission to intervene was made by the Chamber.

Plainly stated Nicaragua maintains, before this Chamber of the Court, its Application for permission to intervene but modified in the sense that the requests made in sections 23 and 24 of its original Application of 17 November 1989 are not being submitted for decision by this Chamber.

This reformed Application, therefore, does not contain the explicit request that has been made to the full Court to

> "exclude from the mandate of the Chamber any powers of determination of the juridical situation of maritime areas both within the Gulf of Fonseca and also in the Pacific Ocean and, in effect, limit the Chamber's mandate to those aspects of the land boundary which is in dispute between El Salvador and Honduras".

The elimination of this explicit request made to the full Court now that we are before the Chamber should not be understood to imply that it is in any way liberating the Chamber from its duty to determine whether it is proper for it to adjudicate on those issues brought by the main parties that would trench on the legal interests of Nicaragua in such a way as to "form the very subject-matter of the decision".

On the other hand, the Order of the Court cannot be understood to mean that a decision on the

propriety of adjudicating can only be taken after the decision on whether to grant the requested application to intervene.

If this were so, it would certainly be a peculiar result that will remove backstage the absolutely preliminary question as to whether it is proper for the Court or the Chamber to adjudicate on the matters brought before it and that - without any great prompting by Nicaragua, but just by looking at a map or reading the text of the *Compromis* or, if that had not been sufficiently explicit, by simply reading the pleading of the Parties - can be clearly seen to trench on the rights of a third party.

In the case of the *Monetary Gold Removed from Rome in 1943 (Preliminary Question)*, the Court said:

> "It has been suggested that Albania might have intervened. The provisions of Article 62 of the Statute give to a third State, which considers that it 'has an interest of a legal nature which may be affected by the decision in the case', the right to request permission to intervene. It has been contended that the inclusion of the provisions for intervention indicate[s] that the Statute contemplates that proceedings may continue, notwithstanding that a third State may have an interest of a legal nature which might enable it to intervene. It is argued that the fact that a third State, in this case Albania, may not choose to intervene should not make it impossible for the Court to give judgment on rights as between the Parties.
>
> Albania has not submitted a request to the Court to be permitted to intervene. In the present case, Albania's legal interests would not only be affected by a decision, but would form the very subject-matter of the decision. In such a case, the Statute cannot be regarded, by implication, as authorizing proceedings to be continued in the absence of Albania." (*I.C.J. Reports 1954*, p. 32.)

In this analysis of Article 62 of the Statute, the Court takes the view that when a State's legal interests would "form the very subject-matter of the decision", then it is not even necessary to have recourse to Article 62 because the impact upon the interests of that State is of such a nature as to eliminate the competence of the Court to adjudicate on the matter. The affair becomes a matter of the propriety of the Court continuing with proceedings which are not authorized by the Statute. In these cases, the State whose interests are affected need not seek to intervene under Article 62. The Court itself is under the obligation *proprio motu* not to adjudicate on the matter.

The other consequence of this interpretation is that Article 62 is applicable when the interests that may be affected do not constitute the very subject-matter of the dispute under the Court's consideration. Our position is that Nicaragua's interests constitute a substantial part of the

subject-matter under consideration, but the point is that this high standard does not necessarily have to be met in order to bring Article 62 into play.

Whilst we are on this point we may recall the words of two Judges of the Court. In the Italian intervention case, then Judge Sette-Camara said,

> "In the light of the best traditions going back to Roman law, it is enough that the State *considers* that it has an interest of a legal nature. It is not bound to produce proof, in a positive and indisputable way, of the existence of this legal interest. Moreover, it suffices that this legal interest *may* be affected. The simple possibility is enough. A proof of pending effective and concrete harm is not required for the decision of the Court under Article 62, paragraph 2." (*I.C.J. Reports 1984*, p. 74.)

Judge Schwebel had expressed a similar view in the Malta intervention case,

> "Article 62 does not provide that, should a State consider that 'it has an interest of a legal nature which *shall* be *determined* by the decision in the case', it may submit such a request. The State seeking to intervene need not prove that it has a legal interest that the Court's decision will determine; it need merely show that it has a legal interest which just 'may' be no more than 'affected' - prejudiced, promoted or in some way altered. This is not an exigent standard to meet." (*I.C.J. Reports 1981*, p. 36.)

It could be argued that for unknown reasons the Court has taken the view, in the two intervention cases it has faced squarely - the Italian intervention of 1984 and the Maltese intervention of 1981 - that it is better policy to refuse the right to intervene whilst giving assurances that the rights of the unsuccessful applicant would be respected and, later, in deciding on the merits apply some form of criteria of propriety and not adjudicate rights contested by third parties.

Certainly, the last word on intervention was not the Italian intervention case itself, but the Libya/Malta decision in 1985. Therefore, not because we desired or were requesting the same outcome, but contemplating its possibility, we pointed out to the full Court, in the observations sent on 1 February 1990, that Nicaragua had the right that the full Court - and not a Chamber - should give a guarantee of the protection of its legal interests,

> "in the same way that the full Court referred to the Italian rights and guaranteed their respect. It is undeniable that the final judgment in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* in which Italy did not participate was 'more limited in scope between the parties themselves, and subject to more caveats and reservations in favour of third States, than it might otherwise have been had Italy been present'. If Nicaragua is not allowed to intervene on an equal footing, this is the result it seeks, and it can only be obtained by a decision from the full Court on the limits of the competence *ratione materiae* of the *ad hoc* Chamber."

But even if we had been before the full Court, we feel that it is more logical, more practical

and fairer to let Nicaragua participate fully in reaching, *mutatis mutandis*, a similar conclusion. Something prejudicial to Nicaragua's legal interests might be asserted in the oral hearings or in any other document or allegation made before the delivery of the decision on the merits. Nicaragua has a right to be present and not simply to rely on the fact that the Court or the Chamber will be alert to defend its interests.

With due respect, if the outcome of this Application for permission to intervene is that Nicaragua will be given a similar guarantee from the Chamber, then an injustice will have been done even if at the end of the day Nicaragua's observations are taken very much into account in the decision on the merits. And the injustice will be, among other things, that Nicaragua will have hanging over its head the sword of the final decision made by a Chamber, that by law has all the authority of the full Court, but that was selected without any participation by Nicaragua. In the Italian intervention, Italy at least was given the guarantee of the full Court and, besides, had a formidable judge of Italian nationality sitting in the full Court.

This delicate question of the propriety of adjudicating very important aspects of the case now before the Chamber was what prompted Nicaragua more than two years ago, in its first communication to the Court on this case mentioned above, to reserve its position on this point. For Nicaragua there is a self-evident case of propriety involved when the Chamber is asked by two riparian States to determine the juridical situation of a geographically constricted Gulf in which there are three riparian States - one of which is, of course, Nicaragua.

The Pleadings in the case have made the matter of propriety even plainer. On the one hand, El Salvador alleges that this Gulf is held in condominium by the three riparian States, and submits

> "That, in view of the Principles of the Law of the Sea ... [the Chamber] apply within the Gulf of Fonseca the juridical status established by the Decision of the Central American Court of Justice handed down on 9 March 1917."

The case of the Central American Court of Justice was one between two of the three riparian States. The parties to that case were not exactly the same as in this case. The parties then were El Salvador and Nicaragua and the alleged "juridical status" it established, and that the Chamber is

now being asked to recognize, is the so-called condominium of this Gulf with three riparian States.

On the other hand, Honduras denies the existence of this condominium and refers rather to the existence of a "community of interests" among the three riparian States and, among other very creative allegations, requests the Chamber in its submissions

> "to adjudge and declare that the community of interests existing between El Salvador and Honduras as coastal States bordering on the Gulf implies an equal right for both to exercise their jurisdictions over maritime areas situated beyond the closing line of the Gulf".

It is not difficult to understand that any decision taken by the Chamber - whether in deciding in favour of one party or the other or by deciding otherwise - is necessarily a decision whose very subject-matter would be the determination of the rights of the three riparian States in respect of the Gulf of Fonseca, and of the waters outside the Gulf.

Nicaragua has not given its consent that its legal interests inside the Gulf or outside of it be affected by proceedings based on a bilateral special agreement to which it is not a party. That is why we have had recourse to Article 62 of the Statute.

As was clearly stated in the *Monetary Gold* case, the fact that article 59 of the Statute limits the "binding force" of any decision to the parties to the case,

> "rests on the assumption that the Court is at least able to render a binding decision. Where, as in the present case, the vital issue to be settled concerns ... [and here in the present instance we substitute Albania for Nicaragua and refer as in the present case the vital issue to be settled concerns the rights of Nicaragua in the Gulf of Fonseca and the waters outside it], the Court cannot, without the consent of that third State, give a decison on that issue binding upon any State, either the third State, or any of the parties before it." (*I.C.J. Reports 1954*, pp. 32-33.)

At this point it is well to emphasize what I believe is evident. Nicaragua is not intruding on the private interests of the Parties. Quite the contrary, the Parties have knowingly intruded upon and affected the interests of Nicaragua. If they had limited their Special Agreement to those areas that really lie behind their more serious bilateral problems and conflicts - that is their territorial dispute - then Nicaragua would not be here.

The fact that this case is based on a special agreement does not put it beyond the pale of intervention. It is absurd to demand a jurisdictional link particularly in cases that are brought by a

special agreement. Obviously the only States that will have this jurisdictional link will be the States party to the Special Agreement. They will be able to submit their claims to the Court or a Chamber of the Court. If by this process they could erase Article 62 from the arsenal of third parties, then they could easily submit claims that could affect these third parties and effectively bar them from intervening. To say that the Court will in any case defend the interests of third parties is to give the Court an omniscience that no tribunal can possibly have and on which no third State can be expected to rely.

If a jurisdictional link is thought necessary, and this is not a thesis we uphold, then it could be said that there might be some basis for this on principles of reciprocity and equality of States if the jurisdictional link of the original parties arose from declarations made under paragraph 2 of Article 36 of the Statute, since all a State would in principle have to do in order to be allowed to intervene, would be to also accept the compulsory jurisdiction of the Court which is a possibility open to all States. On the other hand, special agreements are by nature only open to the special parties. This brings to light the difficulties raised by reading into Article 62 the need for the consent of the main parties.

Judge Hudson has this to say on this subject:

> "If two States are before the Court by reason of declarations made under paragraph 2 of Article 36 of the Statute, it seems a derogation from the condition of reciprocity therein laid down to allow a third party which has made no similar declaration to become a party to their case upon its own motion; yet the problem is not essentially different if two States are before the Court under a special agreement and a third State which is not a party to the agreement seeks to intervene. The jurisprudence of the Court has not set additional conditions for the application of Article 62." (*The Permanent Court of International Justice* (1934), pp. 369-370.)

If a case before the Court affects the interests of a third party, it is absurd to seek the jurisdictional link of the third parties with the original parties. Rather, once it is established at least prima facie that the case may affect the third party, then the original parties should be obligated to show at least an equal prima facie jurisdictional link with the third party or to have the case treated as if it were one of *forum prorogatum*. In this last event, the third party can refuse the invitation or challenge of the original parties, made to its legal interest, to come before the Court and become a

party to the proceedings; or, it can accept this invitation to the *forum*.

The idea that the party whose legal interests are under attack has to show the consent of the attackers in order to defend itself is, frankly, preposterous. Once Article 62 is invoked and the affectation of the interests are demonstrated, the only consent that has to be sought is from the third party in order to be able to continue the case. If this consent is not obtained, then the case should be struck from the list as in any other case of so-called *forum prorogatum*.

To conclude otherwise on the basis of byzantine arguments on the location of Article 62 within the Statute, or to have recourse to the *argumentum ad magistrum* invoking the presumed intention of the draftsmen of the Statute, is to sabotage a perfectly clear, simple and useful mechanism within the Statute, for reasons which have no basis in law or in logic. This type of reasoning - to quote a phrase used by Judge Jennings in another context - would certainly "make litigation before the Court an unattractively hazardous occupation".

This point is relevant to a non-juridical consideration that apparently may have influenced certain past decisions. There is some suggestion to the effect that one of the reasons why it should be necessary to insist on a jurisdictional link in cases of intervention is because this is a safeguard for States coming before the Court so that they will not fear that through this back door of intervention, another State not accepting the jurisdiction of the Court in a reciprocal manner, might be able to take unfair advantage.

Whatever the merits of this argument as a practical consideration, the fact is that in the present instance the reverse is true. Nicaragua accepts the compulsory jurisdiction of the Court without any reservations, whilst El Salvador appended an extensive reservation to its declaration after its conflict with Honduras, and Honduras, contemporaneously with its signing of the compromis with El Salvador that brought it to this Court, made an extensive reservation to its previous very unconditional acceptance of the compulsory jurisdiction of the Court. In another case against Honduras before the full Court, Nicaragua mentioned that the then brand new Honduran reservation was made not to avoid being brought to the Court by El Salvador - with whom they had already agreed to settle their dispute before this Chamber of the Court - but in order to make any

possibility of intervention by Nicaragua in this forseeable case we have now with us, more difficult.

In other words, this is not an unforeseen intervention in the case of two parties who have agreed, by means of a compromis, to settle their bilateral dispute in a procedure that is private to them. This is a perfectly foreseeable intervention in which the Parties - or at least one of them - have dug in behind reservations to their acceptance of the compulsory jurisdiction in order to avoid any defensive interference from the obvious third party.

In spite of this situation, Nicaragua does not wish to oppose the determination of the juridical situation of the maritime areas requested by the Parties. For this reason, we stated in our application that:

> "24. ... Nicaragua wishes to recall that it has a valid and unconditional declaration of acceptance of the jurisdiction of the Court which is in force and would, therefore, be willing to submit to the Court or a Chamber duly appointed, if El Salvador and Honduras so agree, the decision on the determination of the juridical situation of the maritime areas both within the Gulf of Fonseca and also in the Pacific Ocean."

It should, of course, be unnecessary to reiterate that this offer still holds.

In preparing for this case and this hearing, I find myself reverting to the fears I experienced when submitting my first "recurso de casación" before the Supreme Court of Nicaragua nearly 20 years ago. In those types of cases, the first general decision that had to be made was whether to base the appeal on formal errors or on the merits, and, each of these avenues presented different courses on which you had to peg your petition. It was usually a very easy way out for the Supreme Court to say that the appellant had not succeeded in identifying the appropriate cause and had not latched on to the right section of the article invoked, the petitions and allegations that had been made.

When I was thrown into the practice of international law, I was told that this formalism of the Civil procedure was non-existent in the international field. That the International Court of Justice as the paradigm of Tribunals was not out looking for formal nullities of procedure, as if they were snakes in the grass, in order to decide cases against sovereign nations.

And yet I find that this whole field of procedure concerning intervention has become a minefield of formalities created by the Court and has had the unfortunate result of making it almost impossible for States to know with reasonable certainty how to proceed in order to protect their

interests.

> Judge Sir Robert Jennings signals this development in the following fashion:
> "if Italy has, in the course of argument, strayed beyond the permissible limits of a strict intervention, then it would to that extent have to be disappointed by the Court's eventual decision in the main case. But asking too much should not vitiate the application to intervene, provided the proper purposes are included. The Maltese application of 1981 was rejected in effect because Malta asked too little, and drew back from direct involvement in the dispute between Libya and Tunisia. It would be unfortunate if the Court now appears to reject Italy's application because they had asked too much." (*I.C.J. Reports 1984*, dissenting opinion, p. 15, para. 7.)

The Court decided in the Italian intervention case that it could interpret the intention of the Italian intervention in the way it thought adequate and in spite of any express declarations of Italy to the contrary. As Judge Ago said in his dissenting opinion:

> "Italy was not seeking to have its rights recognized, but solely to have the fact noted that it considered itself to possess such rights." (*I.C.J. Reports 1984*, p. 122.)

In this regard, I would wish to anticipate any possibility of misunderstanding by requesting that the Chamber make use of Article 49 of the Statute and call upon the Agent who will be glad to produce any document or to supply any explanations that may be deemed necessary or useful.

Furthermore, if the Chamber should feel that the Application of Nicaragua goes too far or remains too limited, Nicaragua would be willing to adjust to any procedure indicated by the Chamber. The only thing that Nicaragua seeks is to protect its legal interests and it will do so in any way the Statute allows.

In describing the legal interests Nicaragua wants to protect in this case, we have considered it unnecessary to allege or claim a specific right inside the Gulf of Fonseca. It is enough to indicate, as I have done above, that both Parties, among other questions that affect our interests, are asking the Chamber to define or clarify the general or overall status of the whole Gulf of Fonseca in which Nicaragua plainly has rights that are even recognized according to their respective convenience by the Parties. We limit ourselves to giving this indication and reiterating that any such definition or determination or finding affects our legal interests. On the other hand, if the Chamber were to consider the request of Honduras and proceeded to delimit the waters inside the Gulf, it is obvious from looking at any chart that no such delimitation is possible without affecting our interests, if this

delimitation involves the whole of the Gulf of Fonseca.

Outside the Gulf of Fonseca, it is plain from looking at any chart and from the graphics presented by the Parties in their Written Pleadings - particularly those contained in the Honduran Memorial and identified as "C-6 and C-7", that no such demands can be made in the Pacific Ocean without affecting the legal interest of Nicaragua to a significant extent.

In his dissenting opinion in the Italian intervention case, Judge Schwebel says of the legal interests of Italy, "A more compelling case of a legal interest of an intervening State would be hard to imagine." (*I.C.J. Reports 1984*, p. 132.)

I wonder what Judge Schwebel would have said if added to the claims then before the Court, the parties had put in issue the request that the Court declare the Mediterranean a condominium or subject to a "community of interests". And that this "community of interests" was of such a singular nature as to have given Libya or Malta rights to a proportion of the waters of the Atlantic Ocean for an extension of 200 miles outside the Columns of Hercules.

This is not the moment to address all the questions of fact and law posed in the 30 volume-production of Memorials, Counter-Memorials and Replies of the Parties. We necessarily have to reserve our position on all statements contained in the Pleadings and which we are not able to address directly in this hearing.

As has been said, the Parties introduce novel theories on the Law of the Sea which are not always easy to understand and impossible to address adequately in an incidental proceeding that, in any case, is not the appropriate moment or method in which to analyse these theories and allegations.

In the same context, another consideration is that the Submissions of the Parties can be changed after the end of this hearing on intervention and right up to the end of the hearings on the merits. And if this hearing is the only opportunity Nicaragua will be given to defend its rights, then how can Nicaragua express its position if during the hearings on the merits Nicaragua will be excluded from participating? Is the only solution for a country in a situation in which it is not allowed to express its views formally before a tribunal, to have recourse to the embarrassing method used by some countries that in the past years have opted for not appearing before the Court even if it

has been properly seised, and have recourse to sending unofficial messages from the outside?

In the course of this hearing Mr. Ian Brownlie will address the question of the legal interests of Nicaragua and Professor Antonio Remiro will refer to the object of this Application. In doing so, both will address certain questions raised by the original Parties.

Before asking you, Mr. President, to give the floor to Mr. Brownlie, I wish to end my opening speech by quoting words from your dissenting opinion in the Italian intervention case:

> "If a State in the situation of Italy cannot intervene under Article 62, I would like to know when and in what circumstances intervention could take place?" *I.C.J. Reports 1984*, p. 89.)

Mr. President, Members of the Chamber, I believe it is now and under the present circumstances that intervention can take place.

Thank you.

The PRESIDENT OF THE CHAMBER: Thank you Mr. Argüello, I now give the floor to Mr. Brownlie.

Professor BROWNLIE: Thank you Mr. President. I will tell you what an honour it is for me to appear in front of this distinguished Chamber and to that I have to add my regret that our excellent colleague Michel Virally is not among us.

My task today is to address the nature of the interest of a legal nature, pertaining to Nicaragua, which may be affected by a decision on the merits in the main case.

And first of all I would like to present the main elements of my argument.

The structure of the argument must depend, at least in part, on the force and authority to be given to the decision of the full bench of the Court in the Italian intervention case. On this basis two propositions emerge.

First: Accepting the authority of the decision in the Italian intervention case, a decision favourable to Nicaragua would be compatible with the decision in that case for three reasons, which are independently operative:

The first reason is this:

In the circumstances of the present case the Applicant State is not seeking to introduce a fresh dispute.

The second reason is as follows:

The legal interest of Nicaragua is of such a character that it forms part of the very subject-matter of the decision requested by the Parties to the Special Agreement.

The third reason derives from the recognition by the principal Parties of the existence of Nicaraguan legal interests which may be affected by a decision in the case.

That is the first basic proposition, and it involves giving full faith and credit to the reasoning of the decision in the Italian intervention case.

My second main proposition involves the premiss that the decision in the Italian intervention case is of weak authority and that the law relating to intervention remains unsettled in several important respects.

The consequence is that it is justifiable, and indeed necessary, to return to basics and thus to apply the general principles relevant to the application of Article 62 of the Statute as it is drafted.

It will be convenient in my submission to elaborate upon this second main proposition before I elaborate on the first. And it is necessary to deal with some preliminary points.

The first preliminary point is this:

The premiss is that the reasoning of the majority of the Court in 1984 was at best inconclusive and at worst seriously flawed by logical contradictions. This premiss, I would emphasize, is rooted in considerations of good judicial practice, and it is not my intention to deny the general desirability of a principle of judicial consistency.

It is reasonable to assume that the Court (and Chambers thereof) has a discretion to review a previous decision when there are sound reasons of principle for so doing.

In our submission, there are significant grounds for not adopting the reasoning of the majority in the Italian intervention case.

In the first place, the reasoning of the majority was shared by only nine Judges in a Court of 16 Judges. Two separate opinions (of Judge Mbaye and Judge *ad hoc* Jiménez de Aréchaga)

differed as to the reasoning behind the majority Judgment.

And five Judges dissented and in doing so provided full and carefully expressed criticism of the reasoning behind the majority Judgment.

Secondly, there can be little doubt that the principles governing intervention are still evolving and there is, it is respectfully suggested, a judicial duty to reduce the uncertainties which still beset the legal régime in spite of the decisions of the Court in 1981 and 1984.

In this context it would not be unreasonable to suppose that the majority opinion of 1984, the last substantial word on the subject, has failed to produce an adequate level of clarity in the legal régime.

Thirdly, the reasoning of the majority is flawed by logical contradictions which affect the substance of the decision and which must erode its authority to a significant degree.

To understand the character of these logical contradictions it is helpful to refer to the passages in the Judgment in the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case in which the Court explains why the geographical scope of the decision was limited to the areas in which Italy had no claims to continental shelf rights (*I.C.J. Reports 1985*, p. 26, para. 21).

For present purposes it is not necessary to inquire exactly how the Court should act in order to take third State interests into account in the context of continental shelf delimitation.

The key point is that the procedure adopted in the 1985 decision involved action which was dispositive of the rights of Italy in a significant form. The fact that the Judgment only affected certain aspects of Italy's claim is, in my submission, irrelevant.

The distinction drawn by the Court in 1984 between the *preservation* of rights and the *recognition* of rights (*I.C.J. Reports 1984*, p. 23, para. 37) is, it must be said, not a sufficient justification for the procedure adopted in 1985.

In fact what the Court chose to do in 1985 was exactly what Judge Schwebel had foreseen in a gloomy prognostication forming part of the dissenting opinion in 1984. In Judge Schwebel's words:

> "Even if the Court were to hand down a judgment as between Malta and Libya which explicitly is subject to the rights and titles of third States, which expressly reserves competing claims of Italy, and which declares that it is without prejudice to those claims - assuming that the Court were to find itself able to write a judgment on the merits of the case in these legal and geographic circumstances which when applied delimits the shelf between Malta and Libya

> without treating Italy's intervening claims - the judgment 'may' merely 'affect' Italy's claims by its reasoning and in so far as its effect is to allot shelf areas [however conditionally] to Malta or Libya which are areas to which Italy also lays claim."

And Judge Schwebel continues

> "This could be so even if the Court's future judgment were to speak of the relative and not the absolute titles of Malta and Libya."

And he continues

> "The Court could go further. It could limit the scope of its judgment by refraining from indicating the practical application of principles of delimitation to those areas of continental shelf which Italy claims, holding that, as to these areas, delimitation must follow from negotiation or adjudication between or among Italy, Malta and Libya. Such a judgment might satisfy Italy, but would it not constitute a measure of endorsement by the Court of Italy's claims without troubling Italy either to justify those claims or to place them at stake in the current proceedings between the principal Parties?"

And Judge Schwebel concludes

> "Indeed, such a judgment would in effect acknowledge that Italy has an interest of a legal nature which may be affected by the decision in the case were it not for that element of the decision which exempts from its reach the areas which are the object of Italian claims. Thus [he says] the more reasonable approach - given the fact that these areas are already in issue between the principal Parties - would be to grant Italy's request to intervene and oblige it to defend its claims. That would do justice not only to Italy but to Malta and Libya, which otherwise could find that the judgment they seek has been truncated to accommodate claims which they would have forgone the opportunity to refute." (*I.C.J. Reports 1984*, p. 135, para. 12.)

The art of contradiction in the course adopted by the Court in 1985 may be expressed in several ways.

It may be said that what the Court did in 1985 was essentially incompatible with the criteria it had formulated in 1984.

Or it may be said that in the result the Court had given Italy the doubtful benefit of a sort of vicarious and informal intervention but without the full opportunity to address its claims which an actual intervention would have allowed.

Or it may be that the basis of the decision in this respect in 1985 was not related to the principles of intervention at all.

This last possibility may be supported by reference to certain significant passages in the Judgments of the Court.

In the first case the Court both in 1984 (*I.C.J. Reports 1984*, p. 27, para. 43 *in fine*) and in

1985 (*I.C.J. Reports 1985*, p. 25, para. 21 *in fine*; and p. 28, para. 23) placed no little emphasis on the fact that by objecting to Italy's intervention Libya and Malta "have indicated their own preferences".

With respect to the Court, this factor is very far from being conclusive, and is of doubtful relevance. The permissibility or not of intervention, the Court pointed out in 1984, does not depend upon the manner in which the Applicant State formulates its request (*I.C.J. Reports 1984*, p. 19, para. 29). By a parity of reasoning, the posture of objection on the part of the other States concerned should not preclude the decision of issues of principle.

The fact remains that this factor - the attitude of the Parties toward intervention by a third State - form the significant elements in the decision not to allow Italy to intervene. Moreover, paragraph 23 of the Judgment of 1985 comes very close to making this element the *ratio decidendi* of the Judgment in 1984. This paragraph emphasizes "the special features of the present case".

The relevant paragraph reads as follows:

> "It has been questioned whether it is right that a third States - in this case, Italy - should be enabled, by virtue of its claims, to restrict the scope of a judgment requested of the Court by Malta and Libya; and it may also be argued that this approach would have prevented the Court from giving any judgment at all if Italy had advanced more ambitious claims. However, to argue along these lines is to disregard the special features of the present case."

And the Court, this is in 1985, continues:

> "On the one hand, no inference can be drawn from the fact that the Court has taken into account the existence of Italian claims as to which it has not been suggested by either of the Parties that they are obviously unreasonable. On the other hand neither Malta nor Libya seems to have been deterred by the probability of the Court's judgment being restricted in scope as a consequence of the Italian claims. The prospect of such a restriction did not persuade these countries to abandon their opposition to Italy's application to intervene; as noted in paragraph 21 above, the Court observed in its Judgment of 21 March 1984, that in expressing a negative opinion on the Italian application, the two countries had shown their preference for a restriction in the geographical scope of the judgment which the Court was to give." (*I.C.J. Reports 1985*, p. 28.)

With respect to the Court, this emphasis on the attitude of the parties towards intervention by a third State has very little cogency so far as the matter of essence is concerned.

But more to the point, for present purposes, it provides an excellent way of distinguishing the Court's reasoning in 1984 on the basis that it was not in fact founded upon the principles of intervention at all, but in fact upon collateral considerations irrelevant to the application of

Article 62 of the Statute.

I move to my second preliminary point.

In a more general way the authority of the decision of 1984 and the Court's consequential action or inaction in 1985 is diminished by the conspicuous failure of the Court to provide an adequate resolution of the tension between Article 62 and the principle of consent.

The Court in 1984 regarded Article 62 as virtually subject to the principle of consent. This is very clear in my submission from the drafting of the majority opinion, especially in the sequence of paragraphs 31 to 35.

Paragraph 35 is of particular significance for present purposes:

> In this paragraph the Court assumes that if Italy were to be allowed to intervene this "would be admitting that the procedure of intervention under Article 62 would constitute an exception to the fundamental principles underlying its jurisdiction: primarily the principle of consent".

The Court continues in the same vein, and connects the whole issue with the recognition of the compulsory jurisdiction of the Court.

With all due respect to the full Court, to characterize the problem of giving content to the provisions of Article 62 in terms of the principle of consent is to impose an erroneous classification of the problem.

Article 62 is a part of the incidental jurisdiction and there is no compelling logic requiring its provisions to be seen as an "exception" to the principle of consent.

Article 62 is devoted to a specialized and discrete problem. To hinge the application of the article on the principle of consent is quite simply question-begging. If there is an inevitable intermingling of legal interests the reliance on consent produces a sort of see-saw logic. Either the intervention is allowed and the principal parties have to play host to the third State or intervention is not permitted and the interests of the third State are subject to the dispositive powers of the Court in its absence.

In the *Libya/Malta* case the rights and claims of Italy were subject to determination to a certain extent in the Judgment on the Merits, and this was done in the absence of Italy.

The brutal fact is that the principle of consent cuts both ways, as Judge Jennings pointed out in his dissenting opinion in 1984 (*I.C.J. Reports 1984*, p. 148, para. 3).

In the present case the jurisdiction granted by the Special Agreement inevitably extends to legal issues in which Nicaragua has a legal interest.

Such jurisdiction can only be exercised with propriety if intervention is allowed. The principles of consent, equality and reciprocity all in different ways militate in favour of intervention (provided that no fresh dispute is tacked on).

Moreover, the principle of proportionality is relevant as an aspect of ordinary legal logic in this context.

According to the principle of proportionality, intervention under certain conditions is precisely the means of moderating between the various judicial policies at stake.

The very presence of Article 62 in the Statute reflects the need for a proportionate response to the problem which the third State faces in such cases.

In our submission a form of intervention limited to the demonstration and protection of the interests of the intervening State is compatible with Article 62 and strikes a balance between the needs of the third State and the so-called privacy of the original litigation.

For if a special agreement creates a forum in which the legal issues inherently trench upon the interests of a third State, the principle of consent can only be applied equitably if intervention is permitted.

As Judge Oda has demonstrated, the history and the preparatory work of Article 62 provide no evidence for the view that the possibility of intervention was conditioned by the consensual principle either in the form of the prior consent of the original parties or in any other form. I refer to his dissenting opinion in 1985 (see Judge Oda's dissenting opinion, *I.C.J. Reports 1985*, pp. 93-98, paras. 8-17).

The only condition of substance provided for in Article 62 is that the State wishing to intervene considers that it has "an interest of a legal nature which may be affected by the decision in the case".

The only other provision is to the effect that it is for the Court to decide upon requests for permission to intervene.

In the present case if intervention is not permitted Nicaragua's rights will be determined without her consent, and without her being heard on the merits.

There is nothing in the wording of Article 62 which would justify such a result.

I now come to my third and last preliminary point.

Third preliminary point

Before considering the more general principles relevant for the application of Article 62, the procedural nature of Article 62 calls for some appreciation.

Article 62 involves an incidental procedure and an incidental jurisdiction. As Sir Gerald Fitzmaurice observed in the *British Year Book* in an article in 1958:

> "The jurisdiction of the Court to entertain third-party interventions is another example of incidental jurisdiction, the general character of which has already been considered in connection with the indication of interim measures, and equally arises from the existence of express provisions of the Statute which confer this jurisdiction upon the Court and allow it to be exercised independently of the specific consent of the parties." (*British Year Book of International Law*, Vol. 34 (1958), p. 124.)

The basis of the power of the Court to act is the express provision of the Statute and this reflects considerations of procedural necessity and equity.

It follows that Article 62 is not of the same class as the provisions concerning compulsory jurisdiction and thus its wording contains no proviso of the type to be found in paragraph 2 of Article 53. In the same way there is no requirement of the consent of the parties to the case in the context of *Article 63* of the Statute.

It also follows that the Applicant State is only required to satisfy a provisional standard of proof. It need only show that a good arguable claim or claims exist but not that such claim or claims certainly exist or entail a better title than other claims.

> "This conclusion stems from the clear words of Article 62: the Applicant must 'consider' that it has an interest of a legal nature which 'may be affected by the decision in the case'."

This conclusion is also reinforced by considerations of ordinary good sense. The issue is raised on

the way to establishing a right to intervene and the procedure involves a qualifying round and not the race itself.

A useful analogy can be drawn with the case of a plea of jurisdicitonal immunity by a foreign State in a national court, for example, in respect of a claim against specific property. In such a case the foreign State will be required to produce prima facie evidence to support the claim to immunity but no more. But it is not necessary actually to prove title to the property claimed in order to establish immunity because such a requirement would foreclose the very point in issue, namely, the existence or not of the immunity.

Mr. President that concludes my examination of the construction of Article 62, and I shall now turn to the general principles to be applied in its application.

General Principles Relevant to the Application of Article 62

I. *The first general principle* is the impropriety of exercising jurisdiction, including an incidental jurisdiction, when a third State, not before the Court or Chamber, has a substantial interest in the same subject-matter.

This is an independent principle of judicial policy which must surely be relevant to the application of Article 62 and it was of course applied in the *Monetary Gold* case, *I.C.J. Reports 1954*, p. 19.

The issues concerning delimitation both within and outside the Gulf, and the question of its status overall, must involve legal interests of Nicaragua which will form part of "the very subject-matter of the decision" on the Merits.

It is in this context that the principle of consent is seen to work in favour of the integrity of the issues before this Chamber.

II. *The second general principle* is that of equitable estoppel.

This is rooted in the more general principles of consistency and good faith. The concept of equitable estoppel applies in two forms in the circumstances of these proceedings.

First: by their conduct generally and in particular by their assertions in the Written Pleadings, the principal Parties have recognized the Nicaraguan interest in the subject-matter of maritime

claims relating to the Gulf of Fonseca.

By these assertions El Salvador and Honduras have effectively recognized the intermingling of legal interests inherent in the geographical circumstances of the Gulf.

Secondly: by concluding a Special Agreement with a mandate which would inevitably have direct effects on the legal interests of Nicaragua the principal Parties cannot now complain if an intervention were to be permitted. The Special Agreement constitutes quite simply an assumption of the risk of intervention. Indeed, it is difficult to conceive of a Special Agreement less likely to stimulate intervention.

Moreover, if the consensual principle is to be applied with consistency and fairness the Special Agreement can only be activated in the maritime sphere on the condition that intervention takes place.

This consequence is *a fortiori* in present circumstances given that Nicaragua's claims form an integral part of "the very subject-matter of a decision".

As Judge Jennings pointed out in 1984, where third State rights are directly involved, the absence of the third State affects the competence of the Court in any event (*I.C.J. Reports 1984*, p. 156, para. 24).

III. *The third general principle* to be applied is the special character of the law of the sea issues necessarily raised by the formulation in the Special Agreeement.

Maritime delimitation must now involve the application of the equitable principles and relevant circumstances recognized in the jurisprudence of the Court and of other international tribunals.

A major relevant circumstance in the Gulf is the relationships of coasts and it is difficult to see how this factor can properly be taken into account if one of the riparians is excluded.

An even more basic point concerns the overall geographical framework, which consists of an area of semi-enclosed sea with natural entrance points which feature has long been recognized as a bay or gulf. By its very nature, this feature comprehends all its coasts. The feature also involves two natural entrance points, the one forming part of Nicaraguan territory, the other forming part of

the territory of El Salvador.

Moreover, the conceptual underpinning of maritime delimitation in the modern law involves the concept of overlapping natural prolongations of the land territory of the relevant coastal States. It goes without saying that this concept was established in the *North Sea Continental Shelf* cases.

In the geographical circumstances of the gulf the element of overlapping of coastal projections could not be more obvious.

The intermingling of legal interests in the context of maritime delimitation is highlighted by the Written Pleadings produced by the principal Parties.

With your permission, Mr. President, and without going into great detail, I would like to point to some key features of the Written Pleadings.

I shall take the submissions presented by El Salvador in the Counter-Memorial. First, these submissions were also reaffirmed in the El Salvador Reply.

First, El Salvador asked the Chamber to apply the decision of the Central American Court of Justice of 1917. This request follows from the position of El Salvador that the Gulf is subject to a condominium.

The condominium, if it is declared to be applicable, would by its very nature involve three riparians, and not only the parties to the Special Agreement.

Among its other requests, the Government of El Salvador asks the Court:

> "That it determine that the rights and the jurisdiction over the waters and maritime spaces (including the natural resources therein) of the Pacific Ocean beyond the closing line of the Gulf of Fonseca are exerciseable exclusively by El Salvador and Nicaragua on the grounds that such rights arise from the relevant coasts which these two States have on the Pacific Ocean." (iv at p. 295.)

This request speaks for itself.

The pleadings of Honduras are no less decisive for present purposes.

The Memorial of Honduras makes frequent reference to the "community of interests" ascribed to all three riparians, and also to the interdependence of the coastal States (Memorial, II, pp. 593-702 *passim*). Frequent reference is also made to the equality of rights (Memorial, II, pp. 687-693).

The submissions contained in the Memorial of Honduras give an even clearer profile to the key positions adopted by this Party (Memorial, pp. 746-748).

The submissions emphasize the community of interests which is stated to derive from the co-riparian relationship of El Salvador and Honduras within an historic bay.

The Chamber is requested to effect a delimitation within the Gulf taking into account all the relevant circumstances in order to achieve an equitable result.

Finally, the Chamber is requested to draw a line of delimitation at a certain angle based upon the closing line of the Gulf, commencing at a point three miles from the coast of El Salvador, and extending 200 nautical miles into the Pacific.

This venture into the world of legal imagination is illustrated on Chart C.6 of the Memorial.

It simply will not do for Honduras to deal with the question of Nicaraguan interests by its assertion in the Memorial (Eng. trans., p. 141, para. 15) that the area relevant to delimitation outside the Gulf terminates on the eastward side at the mid-point of the closing line across the mouth of the Gulf.

This limitation is not accepted by El Salvador in its pleadings and the area beyond the closing line remains in issue between all three States, with El Salvador using the evident Nicaraguan interest as a tactical weapon against Honduras. In fact Honduras makes it clear that in its view the principle of strict equidistance does not apply as between El Salvador and Nicaragua. In the words of the Honduran Counter-Memorial (Eng. trans., p. 163, para. 5):

> "Accordingly, El Salvador's supposition that there could be a frontier between El Salvador and Nicaragua at the median point of the closing line is not only speculation, but bad law."

The submissions attached to the successive pleadings presented by Honduras remain unchanged in all their essentials. All three Written Pleadings request the Chamber to declare that the community of interests existing between El Salvador and Honduras as riparian States implies an equal right to exercise their jurisdictional rights in respect of the maritime areas situated beyond the closing-line of the Gulf.

Whilst this formulation does not refer to Nicaragua as such, it must necessarily involve a

recognition of Nicaragua's involvement in any legal process of attribution of title and consequent delimitations.

IV. *The fourth general principle* to be applied is the principle of recognition.

In the submission of the Government of Nicaragua the assertions of fact and law on the part of El Salvador and Honduras in the course of these proceedings constitute recognition of the existence of major legal interests pertaining to Nicaragua which form an inherent part of the parcel of legal questions placed in front of the Chamber by the Special Agreement.

In this connection it will be no answer to say that one of or both of the principal Parties is or are objecting to intervention. The issue is not the intervention itself: for that is a matter for the Chamber or the full Court to decide in each case. What is in issue is the existence of a basis for the determination that Nicaragua has one or more legal interests "which may be affected" by a decision on the merits of maritime delimitation.

The submission of Nicaragua is that in their Written Pleadings both El Salvador and Honduras have recognized the existence of such legal interests.

No doubt the usual precedents relating to recognition refer to the recognition of the validity of arbitral awards or specific boundary alignments.

But there is no reason to suppose that the principle of recognition should not apply to other types of *status quo*. Thus it may be recalled that in the Anglo-Norwegian Fisheries case the Court made substantial reference to the toleration of other States of the North Sea in respect of the Norwegian *system* of baselines. (*I.C.J. Reports 1951*, pp. 138-139.)

In the present proceedings the process of recognition has a striking immediacy and directness. It is not a question of the more or less cumulative and casual process involved for example in the *Temple of Preah Vihear* case in which reliance on the Annex I map spanned a period of 50 years, from 1908 to 1958 (*I.C.J. Reports 1962*, p. 32). In the present case the principal Parties were dealing directly with the issues of delimitation and were at all times aware of the possibility of a request for permission to intervene.

A substantial proportion of the submissions of both principal Parties involve direct recognition

of the existence and relevance of the maritime legal interests of the third riparian State in the Gulf. It is true that the recognition to some extent flows from the relationship of the submissions to the geography of the Gulf and to the principles of maritime delimitation.

But the submissions were drafted by specialists in the Law of the Sea and they are addressed to Judges and others who will give them the necessary technical appreciation.

In these circumstances the Governments of El Salvador and Honduras cannot be heard to say that they did not intend to recognize the legal interest of Nicaragua.

If I can take one example from each set of Written Pleadings.

In the case of El Salvador the perfect example is the fourth paragraph of the third set of submissions contained in the Counter-Memorial (p. 295).

I have already drawn the attention of the Chamber to this submission. To the one in which the Government of El Salvador requests the Chamber to declare that the title to areas beyond the closing line of the Gulf inheres exclusively in El Salvador and Nicaragua. And, Mr. President, this request is stated to be "on the grounds that such rights arise from the relevant coast which these two States have on the Pacific Ocean".

So much for recognition on the part of El Salvador.

In the case of Honduras the recognition is equally clear.

Each one of the Honduran Pleadings contains a counterpart act of recognition. Thus the submissions attached to the Honduran Pleadings persistently request the Chamber (in the English text):

> "to adjudge and declare that the community of interest existing between El Salvador and Honduras *as coastal States* bordering on the Gulf implies an equal right for both to exercise their jurisdiction over maritime areas situated beyond the closing line of the Gulf".

With its reference to the titles accruing (so it is asserted) to coastal States as such in respect of areas outside the Gulf, this form of submission contributes an unequivocal recognition of the direct relevance of Nicaragua's legal interests.

There are other passages in the Honduran Pleadings which refer to the interaction of the legal interests of all three States in the context of Honduran claims to areas outside the Gulf.

Two examples will suffice.

In the first example the Honduran Memorial (Eng. trans., p. 127, para. 121) refers to the delimitation effected by Nicaragua and Honduras in 1900. The Memorial continues:

> "The line adopted by this agreement is equidistant from the coast of the two States. Its configuration, particularly at the far end, must incidentally be examined in relation to the drawing of the future Honduran/Salvadorean dividing line so as to leave Honduras a zone of access to the high seas that is not unduly constricted."

Mr. President, it is impossible to see how this could be done without an overlapping with the legal interest of Nicaragua.

I move to the second example.

In an extended passage the Memorial (Eng. trans., pp. 142-145, paras. 18-24) asserts that ths coasts of riparians within the Gulf are relevant to the delimitation of maritime areas outside the Gulf.

In view of the extreme geographical intimacy of the coastal relations of the three riparians this argument must constitute an emphatic recognition of the involvement of the legal interest of Nicaragua.

Mr. President, I would conclude this review of the principle of recognition by pointing to the ironical fact that in their pleadings the Parties inevitably find it necessary to quarrel about the nature of Nicaragua's position. Thus the Honduran Reply (Eng. trans., p. 294, para. 106) has a whole section in which El Salvador is charged with a failure to characterize Nicaragua's position carefully.

V. *The fifth general principle* consists of the general opinion of authoritative writers that the maritime issues relating to the Gulf are inherently trilateral.

If reference be made to the standard work of Fauchille (I, 2, pp. 382-385), published in 1925, and to the classic work on the Law of the Sea of Gidel (T. III, pp. 604-608), published in 1934, neither author has any doubt that the rights of the three riparians are in issue.

Given the developments in the law relating to maritime delimitation since those publications and since the decision in the *North Sea Continental Shelf* cases, the general position must now be *a fortiori*.

VI. *The sixth legal principle* of a general character relevant to the application of Article 62 is quite

simply the principle of procedural fairness. This factor is of particular relevance since the actual raison d'être of Article 62 must be the maintenance of procedural fairness and a necessary balancing of interests.

The inhibition formulated by the Court in the *Monetary Gold* case was based on the procedural impropriety of deciding a question concerning Albanian interests "in the absence of Albania" (*I.C.J. Reports 1954*, p. 32 *in fine*).

Of course, in the *Libya-Malta Continental Shelf* case the Court ended up making determinations affecting Italian interests in its Judgment on the Merits in the absence of Italy.

But this course of action in our submission was problematical.

To require a State to establish its territorial rights in an incidental proceeding is incompatible with an adequate concept of procedural fairness. Italy came into Court in 1984 not to establish a case on the merits but to establish a right to intervene in accordance with Article 62.

An appropriate balancing of interests would involve an intervention proportionate to the interests of the intervening State in the existing subject-matter.

Not to allow intervention in the present case would be to fail to maintain a procedural balance.

Similarly to allow intervention in order to tack on a fresh dispute would be a disproportionate reaction. But no such fresh dispute is involved.

A refusal of intervention would surely involve a substantial breach of the principle of procedural fairness which is itself a ramification of the principle of the equality of States. This principle is expressly recognized in the United Nations Charter and, according to Article 92 of the Charter, the Statute of the Court itself "forms an integral part of the present Charter".

Conclusion on the Application of Article 62

I now come to my conclusion on the application of Article 62 in favour of permitting intervention by Nicaragua.

The wording of Article 62 is straightforward in our submission and it is surprising that it has attracted so many complexities.

The State seeking to intervene does not have to present a case in terms of the merits for it is permission to intervene which is involved and not proceedings on the merits.

In the proceedings by virtue of Article 62 the applicant State has to show a good arguable claim and no more. Moreover, when the applicant is permitted to intervene, this permission is subject to certain conditions, given that so-called mainline intervention is not an issue in these proceedings.

Thus Article 62 can be applied as it stands and no additional guidelines are called for.

However, in so far as the Chamber has a certain discretion in its application of Article 62 then Nicaragua submits that the following factors militate in favour of Nicaragua's intervention:

1. The impropriety of exercising jurisdiction when a State, not before the Chamber, has a substantial interest in the same subject matter.
2. The principles of consistency and good faith constituting equitable estoppel.
3. The special character of the Law of the Sea issues raised by the Special Agreement.
4. The principle of recognition resulting from the declarations of the Parties.
5. The general opinion of authoritative writers concerning the nature of the dispute in the Gulf.
6. The principle of procedural fairness.

Mr. President, I turn now to the issue of the consequences for Nicaragua if permission to intervene were to be refused.

As a practical matter, can adequate protection be given to Nicaraguan interests in some other way?

There are probably three possibilities worth canvassing.

First the Chamber could adopt the policy of the Court in the Italian intervention case and avoid making any determination which could be said to involve overlap of interests between the principal Parties and the third State.

In our submission this course would be unsatisfactory from at least two points of view.

In the first place, such a determination would involve a disposition of the rights of Nicaragua. The fact that this disposition would be only partial and only in the form of a finding as to the

non-existence of Nicaraguan rights in certain areas can make no substantial difference.

And *secondly*, such a proceeding would place severe limitations on the ambit and viability of the maritime aspects of the adjudication envisaged in the Special Agreement.

The second course of possible action available would be to invoke Article 59 of the Statute. The decision of the Court of the Italian intervention case assumed, without much elaboration that "the rights claimed by Italy would be safeguarded by Article 59 of the Statute" (*I.C.J. Reports 1984*, p. 26, para. 42).

With respect to the bench which decided that case it is difficult to accept a position which would leave Article 62 and 63 legally redundant.

As you had occasion to point out in that case, Mr. President, the form of direct protection provided for by Article 62 is entirely different from the modest function of Article 59 in stating the principle of *res judicata* (*I.C.J. Reports 1984*, p. 87, para. 81).

In any event the reality is that a decision of the Court or a Chamber will inevitably have effects, standing as an authoritative determination of specific interests, rights and titles.

The limiting effect of Article 59 is particularly problematical in the context of the issues of sovereignty and sovereign rights involved in the delimitation of maritime areas.

As Judge Jennings felt obliged to point out in his dissenting opinion in 1984: "'Sovereign rights' that are opposable only to one other party comes very near to a contradiction in terms" (*I.C.J. Reports 1984*, p. 158, para. 30).

Moreover, it is exceptionally difficult to see what comforts Article 59 is supposed to give Nicaragua if the Chamber makes determinations relating to the issues concerning the claim of El Salvador to a condominium or the claim of Honduras to a régime of community of interests both inside and outside the Gulf.

The third course of action available would involve reliance on the practice of the Court in adjudicating issues of title to take account of the existence of claims of third States in the region. Again, the decision of the Court in the Italian intervention case offers this as a further guarantee of safety (*I.C.J. Reports 1984*, p. 26, para.43).

Once again, the Court did not offer such elaboration, and it is impossible to see this reference as a substitute for the rights conferred by Article 62.

The relevance of the claims of third States will vary enormously from case to case, and it is significant that the Court makes reference to two decisions involving title to territory neither of which provides even remote analogies to our present concerns - one of them is the *East Greenland* case and the other is the *Minquiers and Ecrehos* case.

In the circumstances of maritime delimitation, and more especially in the geographical circumstances of the Gulf of Fonseca, it is difficult to see how taking account of the interests of the third State will provide any consolation.

The third State will not have been allowed to defend its interests in the merits phase.

The process of maritime delimitation will have involved the subject-matter of the legal interests of the third State - and thus the claims of the third State will have been used as a means of reciprocally confirming the rights of the principal parties.

Such a taking acount of the interest of the absent State, Mr. President, is likely to provide aggravation rather than consolation.

In conclusion, it is submitted that no one of these judicial policies provides an adequate or indeed any substitute for the protection which Article 62 was so clearly intended to provide.

Mr. President, I have now completed the elaboration of my basic proposition according to which it would be justifiable for the Chamber to apply the general principles relevant to the application of Article 62 and that this could be done without the adoption of the glosses placed upon that Article by the decision of the full Court in the Italian intervention case.

The practical justification for such a course is the evident fact that the decision of 1984 (and its sequel in 1985) have left the law in an uncertain state and the judicial reasoning of 1984 is widely regarded as difficult to apply. Indeed, a major part of the legacy of confusion is the belief in some quarters that the Court has actually destroyed the normal function of Article 62.

However, to complete my argument I must now return to my other main proposition, according to which there are certain grounds for intervention in this case which are entirely

compatible with the reasoning of the Court in its decision of 1984.

This is an alternative position obviously.

These grounds are three in number and are independent of each other.

The first ground is that on the facts of the present case Nicaragua is not seeking to introduce a distinct dispute and to tack a new case on to the proceedings.

This question will be examined further by my friend and colleague Antonio Remiro.

The second ground consists of the special character of the issues of law and fact attending the Gulf of Fonseca, and the supposition that the linear segregation of legal interests adopted by the Court in the *Libya/Malta* case in 1985 (*I.C.J. Reports 1985*, pp. 24-28, paras. 20-23) would simply not be appropriate in relation to the issues raised in the Pleadings of the Parties in the present case. This is essentially a factual distinction but it is also related to the precise nature of the legal questions exposed in the three rounds of Written Pleadings.

The third ground involves the principle of recognition. The application of this principle has, of course, been explored already.

The principle now forms the basis of a separate submission which is that the recognition by the principal Parties of the relevance of the legal interests of Nicaragua provides a significant point of distinction between the Italian intervention case and the present case.

This recognition is a major aspect of the present proceedings and it takes many forms. Moreover, it takes the form of formulations in the recently produced Written Pleadings of the principal Parties. This is hardly surprising since it is inevitable that Nicaraguan interests form part of the closely woven fabric of the law of the sea issues relating to the Gulf.

Indeed, the principal Parties as I have already had occasion to point out are actually seen to quarrel on the record about the nature of Nicaragua's legal interests.

In contrast, no such picture emerged in the *Libya/Malta* case and thus a major distinction between the two cases is evident.

Mr. President, I have now completed the main structure of my argument before the Chamber, but before leaving the podium I would like to carry out certain subsidiary tasks.

In the first place, I would like to connect the somewhat technical parameters of intervention with the practical requirements of procedural justice.

Not to allow intervention in this case would be to fail to give full faith and credit to Article 62 of the Statute, the purpose of which is to avoid unfairness to third States affected by litigation in an incomplete system of jurisdiction. If intervention is not allowed Nicaragua will be procedurally disadvantaged in at least three respects.

First, she will be excluded from the proceedings on the merits and the principle *audiatur et altera* pars will be disregarded. This principle is no less applicable to the procedure of intervention than it would be to other types of proceeding, and Dr. Rosenne has described it as "a fundamental rule of judicial procedure" (*The Law and Practice of the International Court*, 2nd ed., 1985, p. 310).

For present purposes the role of the Applicant State is to indicate in a provisional way the nature of the legal interests which may be affected. This involvement in an incidental proceeding for the purposes of triggering the application of Article 62 is not, of course, a substitute for the process of intervention itself: indeed, if it were, Article 62 could never be applied.

The second disadvantage. There is the element of postponement of consideration of the issues. The fact that the Chamber will consider Nicaragua's interests at a later stage and after further argument by the other two riparian States can hardly assist in the effective protection of Nicaragua's legal interests.

Thirdly, a prominent element in the pleadings presented so far by El Salvador and Honduras is the reference to the legal position of Nicaragua. Significant examples can be found in the Replies both of El Salvador (pp. 166-167, para. 6.25; p. 194, paras. 6.87-6.89; pp. 199-201, paras. 6.99-6.101), and of Honduras (pp. 258-259, para. 32; p. 261, para. 39; pp. 277-278, paras. 77-78; p. 294, para. 106).

In face of this evidence it is unpalatable, to say the least, that the legal position of the third State should be seen to be dependent on the tactical posturing of two other States.

It is indeed particularly anomalous that this should be the case in the context of an

adjudication.

Such procedural advantages can only be avoided in our submission if intervention is permitted.

I must now pass on to deal with the Written Observations of the principal Parties on the Application of Nicaragua, in so far as these relate to the question of the legal interest of Nicaragua.

The Observations of El Salvador do not call for detailed response at this stage and Nicaragua will simply reserve her position in response thereto.

However, the Observations of Honduras (pp. 4-7) call for more attention.

In the first place, the Honduran argumentation is characterized by several systematic flaws of logic.

Thus there is no reference to the standard of proof required in the application of Article 62. Then again, it is assumed that the Chamber will adopt the views of Honduras where the application of Article 62 involves the nature of the reasonably forseeable range of issues before these issues are resolved.

And finally, the Honduran Observations (pp. 6-7) contend that the use of a methodology which involves the coast of Nicaragua does not necessarily involve prejudice to the interests of Nicaragua. In the geographical circumstances of the Gulf, the presumption must surely be that there is prejudice. It may be recalled that the *North Sea Continental Shelf* cases were in a sense entirely about methodology and were no less contentious on that account.

Indeed, the extent to which Honduran methodology involved Nicaraguan geography is a consequence of the interaction of Nicaraguan interests with those of the other riparians.

The precise points made by Honduras in its Observations also command attention.

First of all, Honduras (Observations, pp. 5-6) concedes "that Nicaragua has an interest in the legal status of the waters of the Gulf which would be affected by the Court's decision".

And that candour is refreshing.

However, the concession is made exclusively in relation to the question whether the waters of the Gulf could be a condominium and Honduras continues to assert that Nicaragua has "no

comparable legal interests" in respect of the delimitation within the Gulf between Honduras and El Salvador (Observations, p. 6).

Avoiding too much elaboration, three points may be made to refute this assertion.

First: in reality the delimitation issue (however it is defined) can only be resolved if the condominium thesis is rejected in whole or in part (as Honduras admits in the Observations, p. 6) and therefore the delimitation issue is dependent on the resolution of the issue of condominium or not. By analogy with the decision on the second claim in the *Monetary Gold* case (*I.C.J. Reports 1954*, p. 33) the dependence of the delimitation issue on the first question must bring it within the ambit of the Honduran concession. In that case the question, in the *Monetary Gold* case, of priority of claim to the gold as between Italy and the United Kingdom could only arise when the prior question of title as between Italy and Albania had been settled.

Secondly, the Honduran contention as to delimitation within the Gulf is wholly at odds with the fundamental concepts concerning title to maritime areas and delimitation.

As the Court pointed out in its decision in the *North Sea Continental Shelf* cases, the basis of title to continental shelf (and it may be assumed other rights) exists by virtue of the given State's sovereignty over land (*I.C.J. Reports 1969*, p. 22). Thus in the Gulf and outside the closing line, Nicaragua's entitlements must be in issue. Moreover, when the general ambit of those entitlements has to be assessed the *modus operandi* involves reference to all the relevant circumstances. As Judge Jennings put it in his dissenting opinion of 1984: "it is difficult to imagine a more relevant circumstance than the legal rights of a geographically immediate neighbour" (*I.C.J. Reports 1984*, p. 154, para. 21).

Similar considerations obviously apply to the Honduran denial (Observations, p. 7) that Nicaraguan interests are not placed in issue in the areas outside the Gulf.

Moreover, in the case of the areas outside the Gulf, the written pleadings reveal that Honduras claims that the legal status of the waters within the Gulf should determine the status of the waters *outside* the Gulf and, further, that, in relation to the closing line of the Gulf, according to Honduras, El Salvador cannot rely on strict equidistance (Honduras, Counter-Memorial, pp. 162-164).

In the light of the state of Pleadings in our submissions, it is impossible to accept the Honduran assertions that there could be no prejudice to Nicaraguan interests outside the Gulf.

Mr. President, that completes my presentation and with your permission I will withdraw from the podium. Professor Remiro is ready to follow me but that may not be convenient from your point of view.

The PRESIDENT OF THE CHAMBER: Thank you, Professor Brownlie. The time being almost one o'clock, I think we adjourn now and we resume at three o'clock when we will have the occasion to hear Professor Remiro.

The Court rose at 1 p.m.

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